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FILED
MAR 23 1981
ALEXANDER L. STEVAS,
CLERK

80-1610

No. .

In the

Supreme Court of the United States.

OCTOBER TERM, 1980.

DENNIS J. ROBERTS II,
IN HIS CAPACITY AS ATTORNEY GENERAL
OF THE STATE OF RHODE ISLAND,
AND
EDWARD F. BURKE,
IN HIS CAPACITY AS ADMINISTRATOR OF THE
RHODE ISLAND DIVISION OF PUBLIC UTILITIES AND CARRIERS,
APPELLANTS,

v.

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION,
THE STATE OF NEW HAMPSHIRE,
NEW HAMPSHIRE LEGISLATIVE UTILITY
CONSUMERS' COUNCIL,
NEW ENGLAND POWER COMPANY, AND
THE COMMONWEALTH OF MASSACHUSETTS,
APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF THE
STATE OF NEW HAMPSHIRE.

Jurisdictional Statement.

DENNIS J. ROBERTS II,
ATTORNEY GENERAL,
72 Pine Street,
Providence, Rhode Island 02903.
(401) 274-4400

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Questions Presented.*

Invoking for the first time a 1913 state statute, the New Hampshire Public Utilities Commission ("PUC") has prohibited New England Power Company ("NEP") from selling outside the state any energy generated by NEP's federally-licensed hydroelectric projects in New Hampshire. The energy is currently delivered to an interstate transmission network and sold in three New England states including New Hampshire. Dennis J. Roberts II, in his capacity as Attorney General of the State of Rhode Island, and Edward F. Burke, in his capacity as Administrator of the Rhode Island Division of Public Utilities and Carriers ("Rhode Island Appellants"), appeal from a judgment of the New Hampshire Supreme Court upholding the state statute as applied by the PUC. The questions presented are:

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* All of the parties appearing before the New Hampshire Supreme Court are listed in the caption.

Appellant Dennis J. Roberts II, Attorney General of the State of Rhode Island, is, pursuant to Section 42-9-6 of the General Laws of Rhode Island of 1956, as amended, the "legal advisor of all state boards, divisions, departments, and commissions and the officers thereof. . . ." Under the common law, he is the representative of the public, empowered to bring actions to redress grievances suffered by the public as a whole.

Rhode Island General Laws of 1956, Section 39-1-1 et seq., (as amended), vests in Appellant Edward F. Burke, Administrator of The Division of Public Utilities and Carriers,

> the exclusive power and authority to supervise, regulate, and make orders governing the conduct of companies offering to the public in intrastate commerce energy . . . for the purpose of increasing and maintaining the efficiency of such companies, according desirable safeguards and convenience to their employees and the public, and protecting them and the public against improper and unreasonable rates, tolls, and charges by providing full, fair, and adequate administrative procedures and remedies. . . .

1. Whether the New Hampshire statute as applied by the PUC to secure the economic benefits of hydroelectric energy generated within the state exclusively for the citizens of that state unduly burdens interstate commerce in violation of the Commerce Clause of the United States Constitution.

2. Whether Part I of the Federal Power Act, vesting comprehensive licensing authority in the Federal Energy Regulatory Commission ("FERC") over NEP's hydroelectric projects, preempts the statute as applied by the PUC.

3. Whether Part II of the Federal Power Act, vesting exclusive jurisdiction in FERC over wholesale sales of electricity in interstate commerce, preempts the state statute as applied by the PUC to require NEP to rearrange its existing wholesale tariffs and contracts to effect a transfer of the economic benefits of the hydroelectric energy to New Hampshire citizens.

4. Whether the New Hampshire statute as construed and applied by the New Hampshire Supreme Court and the PUC violates the privileges and immunities of the citizens of the State of Rhode Island and the Commonwealth of Massachusetts in contravention of article IV, § 2 of the United States Constitution.

5. Whether, assuming that Congress has exempted the New Hampshire statute from the reach of the Commerce Clause, Congress has violated that Clause by favoring one state over another in an area of fundamental economic and social importance, or, alternatively, whether Congress has violated the rights of the State of Rhode Island and its citizens and the Commonwealth of Massachusetts and its citizens, as guaranteed by the Tenth Amendment or the Privileges and Immunities Clause.

Rhode Island Appellants have adopted the formulation of questions 1, 2 and 3 as presented in NEP's Jurisdictional Statement filed in the companion case of *New England Power Company* v. *New Hampshire Public Utilities Commission, et*

al., No. 80-1208 ("NEP" Juris. St."). Likewise, Rhode Island Appellants have adopted the formulation of questions 4 and 5 as presented in the Commonwealth of Massachusetts' Jurisdictional Statement filed in the companion case of *Commonwealth of Massachusetts, et al.* v. *New Hampshire Legislative Consumers' Council*, No. 80-1471 ("Mass. Juris. St.").

Table of Contents.

Opinions Below	1
Jurisdiction	2
Constitutional and statutory provisions involved	2
Statement of the case	3
The questions are substantial	4
Conclusion	4
Appendix A, Notice of Appeal	follows page 4

Table of Authorities Cited.

Constitutional and Statutory Provisions.

United States Constitution	
art. I, § 8, cl. 3 (Commerce Clause)	2, 3
art. IV, § 2, cl. 1 (Privileges and Immunities Clause)	2, 3
art. VI, cl. 2 (Supremacy Clause)	2, 3
Tenth Amendment	2, 3
16 U.S.C. §§ 792-824K (Federal Power Act)	2
28 U.S.C. § 1257(2)	2
State Statutes	
New Hampshire	
NH RSA 374:35	2

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ON APPEAL FROM THE SUPREME COURT OF THE
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Jurisdictional Statement.

Opinions Below.

The opinion of the New Hampshire Supreme Court, dated December 23, 1980, is not yet reported. It is reprinted in Appendix A to the NEP Juris. St.

The New Hampshire Public Utility Commission's Reports and Orders dated August 27, 1980 and September 19, 1980 are also unreported. They are reprinted in NEP Juris. St., Appendices B and C, respectively.

Jurisdiction.

This is an appeal from a final judgment of the New Hampshire Supreme Court upholding a New Hampshire statute as applied by the New Hampshire Public Utilities Commission to ban the export of hydroelectric energy generated within the state by NEP. The court rejected claims that the statute as so applied violates the Constitution and laws of the United States. Judgment was deemed to have been entered on December 23, 1980, when the decision of that court was docketed by its clerk. Rhode Island Appellants' notice of appeal was filed below on or about January 12, 1981 (App. A, *infra*). This Court has jurisdiction of this appeal under 28 U.S.C. § 1257(2).

Constitutional and Statutory Provisions Involved.

This case raises questions concerning the validity of New Hampshire's hydroelectric export statute, NH RSA 374:35, under the Commerce Clause (art. I, § 8, cl. 3), the Supremacy Clause (art. VI, cl. 2), the Privileges and Immunities Clause (art. IV, § 2, cl. 1), the Tenth Amendment and the Federal Power Act (16 U.S.C. §§ 792-824 k).

NH RSA 374:35 provides:

> Permission Required. No corporation engaged in the generation of electrical energy by water power shall en-

gage in the business of transmitting or conveying the same beyond the confines of the state, unless it shall first file notice of its intention to do so with the public utilities commission and obtain an order of said commission permitting it to engage in such business. Any such corporation engaged in the business of transmitting or conveying such electrical energy beyond the confines of this state pursuant to such order shall discontinue such business in whole or in part, to such extent and under such conditions as the commission may order, whenever, after notice to such corporation and hearing thereon, the commission shall find that such electrical energy or the portion thereof affected by said order is reasonably required for use within this state and that the public good requires that it be delivered for such use.

The texts of the Commerce Clause, the Supremacy Clause, the Privileges and Immunities Clause and the Tenth Amendment are set forth in Appendix A to Mass. Juris. St., and therefore are not repeated here. Relevant portions of the Federal Power Act are set forth in NEP Juris. St.; Appendix E, and likewise are therefore not repeated here.

Statement of the Case.

NEP and Massachusetts have each accurately and competently set forth the Statement of the Case in their respective Jurisdictional Statement. Therefore, Rhode Island Appellants adopt and rely upon those Statements for the purposes of this Jurisdictional Statement.

The Questions are Substantial.

NEP and Massachusetts have each accurately and competently set forth at length in their respective Jurisdictional Statements the reasons why these questions are substantial. Therefore, Rhode Island Appellants adopt and rely upon those arguments for the purposes of this Jurisdictional Statement.

It should be noted that approximately twenty-two percent (22%) of NEP's generation is sold to Rhode Island customers. While it may be difficult to fix the precise economic impact of the New Hampshire decisions upon such customers, no party to this proceeding suggests that the stakes herein are less than enormous, not merely in money but also in the potential for human suffering. This fact is amply illustrated by the range of interests arrayed against the New Hampshire Appellees in these appeals.

Conclusion.

Probable jurisdictions should be noted. The Court may want to consider summary reversal.

Respectfully submitted,

DENNIS J. ROBERTS II,
Attorney General,
72 Pine Street,
Providence, Rhode Island 02903.
(401) 274-4400

March, 1981.

APPENDIX

Appendix A.

The State of New Hampshire Supreme Court.

APPEAL OF NEW ENGLAND POWER COMPANY

Docket No. 80-396.

Notice of Appeal to the Supreme Court of the United States.

Notice is hereby given that Dennis J. Roberts II, in his capacity as Attorney General of the State of Rhode Island and Edward F. Burke, in his capacity as Administrator of the Rhode Island Division of Public Utilities and Carriers, appellants below, hereby appeal to the Supreme Court of the United States, pursuant to 28 U.S.C. Section 1257(2), from the final judgment of the New Hampshire Supreme Court entered on December 23, 1980, which upheld against constitutional challenge, NH RSA 374:35 and Order No. 14,492 of the New Hampshire Public Utilities Commission.

Respectfully submitted,

DENNIS J. ROBERTS II,
Attorney General,
EDWARD F. BURKE,
Administrator.

By their attorneys,

DENNIS J. ROBERTS II,
Attorney General,
JOHN R. McDERMOTT,
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72 Pine Street,
Providence, RI 02903.

Dated: January 9, 1981.